Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Cbeyond, Inc. Petition for Expedited Rulemaking to require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act		WC Docket No. 09-223

COMMENTS

XO Communications, LLC ("XO") hereby files its comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on December 14, 2009,[1] which responds to the *Cbeyond Petition*.[2]

I. INTRODUCTION AND SUMMARY

XO is a facilities-based competitive local exchange carrier ("CLEC") which has spent over $7 billion to construct extensive network facilities serving 75 local markets across the United States. These facilities include:

- Approximately one million miles of metro fiber
- An 18,000-route mile, nationwide, 1.2 Terabit inter-city network
- Robust switching platform

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1 Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Filed by Cbeyond, Inc., WC Docket No. 09-223, Public Notice, DA 09-2591 (rel. Dec. 14, 2009) ("*December 14th Public Notice*").

2 Cbeyond, Inc. Petition for Expedited Rulemaking to require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act (filed Nov. 16, 2009) ("*Cbeyond Petition*").

- Nearly 1,000 central office collocations
- More than 3,000 fiber-fed buildings on net
- Fully peered Tier 1 IP network with more than 100 private and public peering relationships
- 28-31 Ghz spectrum in 75 markets

Over these facilities, XO provides state-of-the-art business and carrier services to more than 90,000 customers. Yet, even with all of this capital investment and network capability, XO reaches entirely over its own facilities only a small percentage of the nation's customer premises, and it must continue to rely on leasing unbundled network elements ("UNEs), especially loop facilities, from incumbent local exchange carriers at rates set at total element long run incremental cost ("TELRIC") to bring competitive alternatives to most customers.[3] XO's approach, of course, is exactly what the authors of the Telecommunications Act of 1996 ("1996 Act") intended: accelerate the development of local competition by allowing competitive providers to access crucial network facilities from ILECs while they construct their own infrastructure.

Unfortunately, the Commission short-circuited the development of local competition in the 2003 *Triennial Review Order* by eliminating the ILEC's obligation to provide access to unbundled hybrid fiber-copper loops and fiber-to-the-home ("FTTH") loops.[4] By restricting

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[3] XO serves a approximately 1% of its customers entirely over its own facilities and relies on ILECs for 96% of its last mile access and alternative vendors for only 3%. XO relies on ILECs so extensively because alternative vendors have constructed very few loop facilities. For instance, in the overall Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach markets, less than 2% of the commercial buildings are served by alternative vendors. Even in the densest areas in those markets, less 5% of the commercial buildings are served by alternative vendors.

[4] *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC rcd. 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

access to these next-generation transmission facilities as UNEs, the Commission gravely limited CLECs' abilities to provide much in demand cutting-edge services particularly to small and medium-sized business customers. Without a choice of providers, these users have suffered with inadequate and costly service and with little hope that this situation would change. Moreover, the offsetting benefits envisioned by the Commission because of its "new wires" policy, widespread deployment of FTTH and other fiber infrastructure, have hardly been achieved. Of the larger ILECs, only Verizon has conducted a major deployment of FTTH networks, and, even it has decided that it will not upgrade millions of its lines and wants to sell many of them to other providers. Consequently, the policy fashioned by the Commission seven years ago is badly in need of reworking so that fiber loop facilities of ILECs are offered on an unbundled basis.[5] In these comments, XO discusses the need for the Commission to use the *Cbeyond Petition* to institute a notice of proposed rulemaking to revisit the issue and then conclude that it should once-again permit competitors to have access to fiber-based UNE loops.

II. THE TIME IS RIPE TO FIX THE FLAWED NO "FIBER" UNE LOOP POLICY

In the *TRO*, the FCC based its decision to no longer require the unbundling by ILECs of fiber facilities primarily on several assumptions:

(1) There was a need to provide incentives to accelerate the deployment of broadband and advanced telecommunications infrastructure;[6]

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5 Numerous commenters in the Commission's National Broadband Plan docket (WC Docket No. 09-51), in their comments filed on June 8, 2009, supported the need for greater access by competitors to UNEs. For instance, the National Association of State Utility Consumer Advocates believes that "some form of effective unbundling is necessary" (at 62), and the National Association of Telecommunications Officers and Advisors states that the FCC "should reinstitute some common carrier provisions and local loop unbundling" (at 40).

6 *TRO*, at ¶¶ 278, 288.

(2) It would be sufficient for CLECs to have continued access to copper-based loop facilities;[7] and

(3) CLECs would not be at a disadvantage vis-à-vis the ILECs in deploying fiber loops and could reap significant revenues from such deployments.[8]

Cbeyond responds in its petition to each of these assumptions, either proving them wrong or at least substantially in error.

First, Cbeyond demonstrates using the 2009 study by Economic and Technology, Inc. that ILEC capital expenditures did not increase significantly "since deregulatory concessions have been implemented" while CLEC investments are "far lower than they had been during the first six years following passage of the 1996 Act, when wholesale rates and access were regulated."[9] Moreover, in the past several years, ILEC capital expenditures have been declining and the expectation is that this trend will continue.[10] For example, AT&T's wireline capital expenditures declined by 31% between 2008 and 2009 and are expected to decline further, by another 5% this year. Verizon, despite its FTTH deployment, decreased wireline capital expenditures by approximately 10% each of the past two years and similar declines are expected over the next several years. As for Qwest, its capital expenditures decreased by 23% between 2008 and 2009. It is difficult to argue that these are the kind of robust network expenditures that the Commission envisioned would result from it deregulatory policies.

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7 *Id.*, at ¶ 291.

8 *Id.*, at ¶ 274.

9 *Cbeyond Petition*, at 16.

10 All data on current or past capital expenditures are taken from company reports and presentations. Estimates of expected capital expenditures for AT&T and Verizon are taken from Bernstein Research's January 20, 2010 report. Estimates for Qwest are taken from FBR Capital Market's October 20, 2009 report. It also should be noted that Morgan Stanley expects capital expenditures to decline for other ILECs as well, including Frontier (October 30, 2009 report) and Windstream (November 10, 2009 report).

Second, Cbeyond provides its own experience showing that even where ILECs deploy fiber, they "do not proactively market to small businesses the applications that take advantage of the capacity that fiber and hybrid loops can deliver."[11] Third, Cbeyond shows even though access to unbundled copper loops is important, access to fiber is needed to provide, particularly to small business, "proven applications that yield unquestioned efficiencies."[12]

III. TO ENHANCE THE DEVELOPMENT OF LOCAL COMPETITION AND ACCELERATE BROADBAND DEPLOYMENT, THE COMMISSION SHOULD ACT NOW TO CONSTRUCT A PROCESS TO ENSURE ANY RETIREMENTS OF COPPER LOOPS BY ILECS ARE IN THE PUBLIC INTEREST

A. The Commission Should Focus on Ensuring that ILEC Copper Loops, a Critical National Asset, Continue to be Available as UNEs.

As the Commission proceeds to consider the *Cbeyond Petition*, it should not lose its focus on addressing the immediate concern raised by XO and other parties regarding the premature retirement of copper loops by ILECs.[13] The nation's legacy copper loop plant is a national asset that was constructed largely under the protection of a government-sanctioned monopoly, paid for by American ratepayers, and deployed by large and small ILECs during the 20th century. This valuable ubiquitous nationwide infrastructure - including copper loops and

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11 *Id.*

12 *Id.*, at 18.

13 Petition for Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops, XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications, and Eschelon Telecom, Inc., RM-11358 (Jan. 18,2007); Petition for Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, BridgeCom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Eureka Telecom, Inc. d/b/a InfoHighway Communications, Florida Digital Network, Inc. d/b/a FDN Communications, IDT Corp., Integra Telecom. Inc., DeltaCom. Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Pacific Lightnet, Inc., RCN Telecom Services, Inc., RNK, Inc., Talk America Holdings, Inc., TDS Metrocom, LLC, and U.S.Telepacific Corp. d/b/a Telepacific Telecommunications RM-11358 (filed Jan. 18, 2007) ("*CopperRetirement Petitions*").

copper subloops - has played and continues to play an essential role in building businesses, improving the nation's standard of living, and ensuring the availability of telecommunications services during public safety and homeland security crises. Legacy copper plant is the most widely deployed broadband infrastructure in use today, with most commercial buildings around the country today being served by copper plant.[14]

With the continued development and evolution of copper-based technologies, copper plant can deliver substantially more bandwidth than it could just five years ago. Copper loops now have the capability of delivering data speeds of more than 45 Mbps. Moreover, in the relatively near future, copper infrastructure may be capable of supporting transmission speeds of 100 Mbps or greater, data rates that can support a complete triple play of voice, data, and video services comparable to the offerings available over fiber loops. CLECs have capitalized on these technological developments, and their broadband product offerings continue to expand, based on the extraordinary technical characteristics of this legacy copper plant. Given its near ubiquity and these robust capabilities, the existing copper infrastructure represents a ready-made solution for expanding broadband access in both the residential and business markets.

One copper-based technology that appears particularly promising for broadband development in the United States is copper-based Ethernet access, or "Ethernet-over-copper" ("EoC"). Whatever the medium, Ethernet applications are relatively easy to deploy and use, support ever-increasing data rates, and enable broadband access at a low "cost per bit." Ethernet technology is widely used today to meet the telecommunications needs of businesses,

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[14] Fiber optic cables today extend to less than 20% of business locations in the United States. *See Leveraging Installed Copper to Reach Underserved and Unserved Community Anchor Institutions,* Hatteras Networks, at 6 (filed in GN Docket No. 09-51 on June 8, 2009) ("*Hatteras Networks Report*") (citing Vertical Systems Group, "Got Business Fiber? U.S. Fiber Penetration," *available at:* http://www.verticalsystems.com.

governmental agencies, and other community "anchor tenants," such as hospitals, schools, and libraries. These customers rely on Ethernet-based services for wide-area solutions that can connect their disparate locations and provide robust packet data network bandwidth.[15].

XO and numerous other CLECs are utilizing EoC technology to extend the reach of their metro and wide area Ethernet networks to business customer locations outside today's fiber footprint. Competitive and incumbent carriers now have large EoC deployments in major markets all over the United States, with plans to roll out additional markets in 2009 and 2010.[16] Accordingly, as discussed below, the FCC should amend its copper retirement rules to establish a new regulatory framework that stops ILECs - based on their unilateral action and without any regulatory oversight - from wasting this important resource and deterring effective competition from new providers.

B. The Commission Needs to Rework the FCC Copper Retirement Rules as set forth in the *Copper Retirement Petitions.*

ILEC retirement of copper facilities, along with other types of network changes, is governed by Part 51 of the FCC's rules.[17] In the *TRO,* the FCC effectively left copper retirement to the unilateral discretion of incumbent LECs. To remove their copper plant or otherwise eliminate competitive access to these facilities, ILECs need only provide public notice of this planned action, without any substantive justification.[18] Only those parties using the copper facilities at issue are eligible to object, and those objections are limited to timing issues.[19] Potential competitors considering the use of that copper plant have no opportunity to raise public interest considerations, and the FCC does not assess the competitive or public interest impact of

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15 *See Hatteras Networks Report* at 3.
16 Id., at 7.
17 47 C.F.R. §§ 51.325-51.335.
18 47 C.F.R. § 51.333.
19 *Id.*

this action. In effect, the existing rules leave outside parties with no way to stop incumbent LECs from removing existing copper infrastructure - along with its potential to offer a competitive alternative for consumers and businesses.

As noted, the FCC's current rules do not require ILECs to justify their retirement of copper plant, and these carriers have in fact not provided a legitimate justification for this ongoing practice. The continuing presence of copper loops only rarely physically precludes construction of fiber loop overbuilds, and in most cases there is no need to remove existing copper facilities to deploy fiber loops to customers. Nor is copper retirement economically efficient. The FCC's rules do not impose on ILECs any obligation to maintain existing copper loops and copper subloops in serviceable condition, except to the extent that such facilities are requested by CLECs as UNEs, pursuant to Section 251(c)(3) of the Act. When facilities are unbundled, ILECs are appropriately compensated at rates established by state commissions pursuant to Section 252(d) of the Act.[20]

Retiring any segment of existing copper infrastructure is an irrevocable action that permanently deprives CLECs, consumers, and businesses of the ability to use that plant for broadband and other services. Significantly, as XO has itself experienced, an ILEC's retirement of copper in even one small portion of a market can cause a CLEC to abandon its plans throughout that market. To enable competitive providers that might rely on copper facilities to plan their deployments, they need sufficient advance information about an ILEC's plans to retire these facilities and the ability to participate in a process where regulators determine whether such retirements are in the public interest.

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20 Section 51.319(a)(3)(iii)(B) of the FCC's rules expressly states that incumbent LECs "need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access," pursuant to Section 251 (c)(3) of the Act. 47 C.F.R. § 51.319(a)(3)(iii)(B); 47 U.S.C. § 251(c)(3).

It thus is imperative that the FCC reverse the ILECs' continuing premature retirement of the nation's copper infrastructure. To that end, XO and a group of other carriers in 2007 filed *Copper Retirement Petitions* requesting that the FCC amend its Part 51 rules governing copper retirement. Under the proposed rules, the FCC would conduct a formal, case-by-case review of incumbent LEC requests to retire copper loop, subloop, and feeder facilities. To approve a request, the FCC would have to find that the network change furthered the public interest. Given the likely harm to broadband competition, proposed copper retirements would be subject to a presumption that they do not serve the public interest.[21] In addition, all interested parties would be permitted to participate in the approval process and object to a proposed copper retirement on public interest grounds. XO urges that the FCC move promptly to adopt the *Copper Retirement Petitions'* proposed rules in its pending proceeding (RM-11358).

IV. UNBUNDLED NETWORK ELEMENT PRICING MUST BE AT TELRIC

XO disagrees strongly with the *Cbeyond Petition's* proposal that "incumbent LECs can charge competitors the same prices for...[unbundled fiber] that the incumbent LECs charge their own retail customers"[22] and with the use of section 10's forbearance mechanism to achieve that objective.[23] In crafting the 1996 Act, Congress included specific language in section 252(d)(1) providing that rates for UNEs shall be "based on the cost (determined) without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," which may include a reasonable profit.[24] A short time later, the Commission,

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21 An ILEC could rebut this presumption only if it showed that (i) the deployment of fiber to the customer premises would be impossible if the copper facilities at issue were mained, and (ii) that this retirement is otherwise in the public interest. *Copper Retirement Petition* by XO et al. at 22.

22 *Cbeyond Petition* at 4.

23 *Id.* at n. 43.

24 47 U.S.C. § 252(d)(1).

in the *Local Competition Order*, implemented this statutory mandate by adopting the TELRIC pricing methodology and supported this decision by concluding:

> In dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market and existing competitors may decide to leave. Prices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs. New entrants should make their decisions whether to purchase unbundled elements or to build their own facilities based on the relative economic costs of these options. By contrast, because the cost of building an element is based on forward-looking economic costs, new entrants' investment decisions would be distorted if the price of unbundled elements were based on embedded costs. In arbitrations of interconnection arrangements, or in rulemakings the results of which will be applied in arbitrations, states must set prices for interconnection and unbundled network elements based on the forward-looking, long-run, incremental cost methodology we describe below. Using this methodology, states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element. They may set prices to permit recovery of a reasonable share of forward-looking joint and common costs of network elements.[25]

Thus, in essence, the Commission determined that pricing UNEs based on TELRIC methodology was essential to implement the statue and for the development of local competition. The Commission's action was later upheld by the United States Supreme Court.[26] Moreover, except for a minor effort to re-examine TELRIC as part of the *TRO*[27] and a subsequent Notice of Proposed Rulemaking,[28] which was never concluded, the TELRIC pricing methodology has gone

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25 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC RCD 15499 at ¶ 620 (1996) ("*Local Competition Order*").

26 *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002)

27 *TRO*, at ¶ 675.

28 *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173, FCC 03-224 (rel. Sept. 15, 2003).

unchallenged at the Commission. It remains the law of the land, and it provides a sound economic basis for the development of local competition.

Nowhere in its petition does Cbeyond articulate the economic rationale for altering the use of TELRIC pricing for UNEs and instead setting prices for fiber-based UNEs at the ILEC's retail rates. Nowhere in its petition does Cbeyond articulate the legal rationale that would justify forbearance from section 251(d)(1). Without such supporting evidence or rationales, XO can only conclude there are none. That, of course, is not surprising given the proven rationale and value of the TELRIC methodology. Should the Commission decide to proceed to consider Cbeyond's request that the Commission reinstitute access to fiber-based UNE loops – which XO supports -- XO believes it has no choice, either legally or economically, but to continue to rely on use of the TELRIC methodology.

V. CONCLUSION

The *Cbeyond Petition* provides sufficient evidence upon which the Commission should initiate a rulemaking proceeding to rework its flawed policy to eliminate access to fiber-based UNE loops. XO also urges the Commission to conclude the proceeding promptly and find that it should permit access to fiber-based UNE loops, which, of course, should be priced based on the TELRIC methodology. At the same time, the Commission should proceed with all dispatch to construct a process to ensure that ILECs cannot retire copper facilities unless they first demonstrate any retirement is in the public interest. Without such protections, local competition and broadband deployment will suffer.

Respectfully submitted,

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